STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 14, 2011
v	No. 295458 Oakland Circuit Court
BRYAN WILLIAM WASSENAAR, Defendant-Appellee.	LC No. 2009-227339-FH

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

The prosecutor challenges the trial court's order granting Bryan William Wassenaar's motion to suppress evidence and dismissing charges of delivery and manufacture of marijuana[1] and possession of a firearm during the commission of a felony.[2] We reverse and remand for further proceedings.

Police officers went to Wassenaar's residence to investigate a tip that marijuana was being sold at that location. Wassenaar denied selling or using narcotics, but invited the officers to enter the residence. Wassenaar told one officer that he had a marijuana pipe on the front porch that he had used that morning. The officer confiscated the pipe, which contained residue, and returned with Wassenaar to the kitchen, which was a small room with one entrance/exit. An officer acknowledged that, although a crime had been committed at that point and he had probable cause for a warrant, he did not provide *Miranda*[3] warnings to Wassenaar. The officer asserted that at this point he had not made a decision to arrest, had not drawn his gun or placed Wassenaar in handcuffs, and had not indicated to Wassenaar that he was under arrest. Wassenaar did not ask to leave but said he did not feel free to leave. Wassenaar's friends were allegedly told they could not leave and one of the officers acknowledged that he would have stopped Wassenaar if he had attempted to leave.

[1] MCL 333.7401(2)(d)(*iii*).

[2] MCL 750.227b.

[3] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

An officer again inquired about the presence of narcotics in the home. He allegedly said in a stern or aggressive manner that he was going to tear the place apart so Wassenaar might as well cooperate and that if he did not show them around the officer would secure a warrant. At this point, Wassenaar acknowledged that he had three marijuana plants and led the officers to a bedroom closet where the plants were maintained. When asked if there was anything else, Wassenaar said that his "buddy's guns were in his top dresser drawer." He allegedly consented to a search, which revealed two revolvers. A one-ounce bag of marijuana and paraphernalia were subsequently discovered.

Wassenaar moved to suppress the evidence. The trial court concluded that Wassenaar was not in custody when he revealed the marijuana pipe, but that the pipe provided probable cause for arrest and an additional search. The trial court concluded that under the totality of the circumstances, neither Wassenaar nor an objective person would have reasonably believed that he was free to leave. The trial court concluded that because Wassenaar was in custody at this point the continued questioning and search violated his constitutional rights.

The prosecutor first contends that the trial court erred in concluding that Wassenaar was in custody after the marijuana pipe was found. A trial court's findings of fact at a suppression hearing are reviewed for clear error, whereas the application of constitutional standards to the facts is reviewed de novo.[4] The question of whether a defendant was in custody at the time he or she made pertinent statements is reviewed de novo.[5]

This Court has stated:

> It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation. The term "custodial interrogation" means "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'"[6]

Further:

> To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being *whether the accused reasonably could have believed that he was not free to leave*. The determination of custody depends on the objective circumstances of

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[4] *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

[5] *People v Herndon*, 246 Mich App 371, 394; 633 NW2d 376 (2001).

[6] *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999) (citations omitted).

> the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned.[7]

There exists a body of case law recognizing that an interrogation in one's home is usually regarded as noncustodial.[8] By way of example, this Court has found that a defendant was not in custody under the following circumstances:

> The police officers went to defendant's house to investigate whether defendant had any involvement in the shooting. Although the officers entered defendant's home, they did so with defendant's mother's permission. Further, there is no evidence that the police had their weapons drawn or were otherwise asserting control over the scene. Indeed, the officers were in plain-clothes. When the police entered defendant's home, at least two of the officers saw defendant at the foot of the basement steps and Crosby asked him to come up to the kitchen. There is no evidence that Crosby ordered defendant to come up or otherwise acted in a way that would give the impression that defendant was not free to disregard the request. The officers also questioned defendant in his own home rather than in a formal police setting. They did not handcuff defendant or otherwise restrict his movement. Finally, defendant's mother was present with him when the police officers questioned him.[9]

These cases indicate that an important characteristic of questioning that occurs in the home is the absence of a coercive atmosphere. But in this circumstance, the trial court determined that the atmosphere was coercive because Wassenaar was cornered and questioned after the officer knew he had committed a crime and while other officers were present. The facts indicate the officers had clearly exerted control. Further distinguishing this case is the fact that Wassenaar was never told that he was not under arrest or that the officers would leave if he wanted them to do so. Given these circumstances, the mere fact that the questioning took place in Wassenaar's home is not dispositive.

The prosecutor further contends that an individual would not reasonably think he would be restrained for the crime of possessing narcotics paraphernalia. But, because there was residue

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[7] *Id.* (emphasis added, citations omitted).

[8] *People v Coomer*, 245 Mich App 206, 220; 627 NW2d 612 (2001). See also *Minnesota v Murphy*, 465 US 420, 433; 104 S Ct 1136; 79 L Ed 2d 409 (1984).

[9] In *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op at 4 (citation omitted).

in the pipe and residue is sufficient to establish a possession charge[10], it would be reasonable for a person to be apprehensive of an arrest. The existence of grounds for an arrest serves to further distinguish this case.

Under the totality of the circumstances, we conclude that the trial court did not err in finding that Wassenaar was "in custody" before he told the officers about the marijuana plants and the guns. Wassenaar would not reasonably have concluded that he was free to leave after the discovery of the pipe with residue and while he was blocked in by an officer in a relatively small space. One of the officers also indicated that Wassenaar was not actually free to leave, which buttresses the conclusion that a person in Wassenaar's situation would reasonably have concluded that there was no choice other than to remain. Since Wassenaar was in custody and did not receive *Miranda* warnings, his statements cannot be used against him.

The prosecutor also argues that even if Wassenaar's statements cannot be used, the physical evidence obtained was admissible. Specifically, the prosecutor asserts that even if defendant's Fifth Amendment *Miranda* rights were violated, the Fifth Amendment applies only to testimonial evidence. The prosecutor maintains that the physical evidence (marijuana and guns) should not have been excluded.[11] Whether a *Miranda* violation requires exclusion of physical evidence presents a question of law. "Questions of law relevant to a motion to suppress are reviewed de novo."[12]

In the case cited by the prosecutor, the police did not fully apprise the defendant of his *Miranda* rights *after arrest*. While the government conceded that the defendant's answers to questions at that time would be inadmissible, it argued that the defendant's answers, although unwarned, were not compelled. The Court concluded that the police did not violate the defendant's constitutional rights by asking unwarned questions; "[p]otential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial."[13] While the "physical fruit of actually coerced statements" would be excluded[14], the Court held:

> Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, "[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy" for

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[10] See *People v Harrington*, 396 Mich 33, 37, 42, 49; 238 NW2d 20 (1976).

[11] See *United States v Patane*, 542 US 630; 124 S Ct 2620; 159 L Ed 2d 667 (2004). *Patane* was a plurality decision; however, a majority of five justices agreed on all points cited.

[12] *People v Keller*, 479 Mich 467, 473; 739 NW2d 505 (2007).

[13] *Id.* at 641.

[14] *Id*. at 644.

> any perceived *Miranda* violation. There is simply no need to extend (and therefore no justification for extending) the prophylactic rule of *Miranda* to this context.
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> The Court of Appeals ascribed significance to the fact that, in this case, there might be "little [practical] difference between [respondent's] confessional statement" and the actual physical evidence. The distinction, the court said, "appears to make little sense as a matter of policy." But, putting policy aside, we have held that "[t]he word 'witness' in the constitutional text limits the" scope of the Self-Incrimination Clause to testimonial evidence. . . . [15]

There are no meaningful distinctions between the case relied on by the prosecutor and the instant case. Wassenaar was lawfully restrained when he made his statement to the police.[16] His statements were unwarned but not coerced. Although Wassenaar did not receive a *Miranda* warning before he made statements to the police that led to the discovery of the physical evidence, the marijuana plants and guns themselves were admissible.

Based on our disposition of this issue, we need not decide whether Wassenaar validly consented to the search.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray

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[15] *Id.* at 643-644 (citations omitted).

[16] Cf. *United States v Villa-Gonzalez*, 623 F3d 526 (CA 8, 2010) (where the defendant was unlawfully seized in violation of the Fourth Amendment and the unwarned statements were the fruit of the illegal seizure, suppression of physical evidence would be required).